STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	:	
	:	
Petition for Arbitration pursuant to Section	:	
252(b)of the Telecommunications Act of	:	**01-0466**
1996 to establish an interconnection	:	
agreement with Illinois Bell Telephone	:	
Company.	:	

PROPOSED ARBITRATION ORDER

By the Commission:

I. PROCEDURAL BACKGROUND

This proceeding was initiated by a Petition for Arbitration ("Petition") filed with this Commission on June 25, 2001 by XO Illinois, Inc. ("XO"), pursuant to subsection 252(b) of the federal Telecommunications Act of 1996 ("Federal Act")[1] and 83 Ill.Adm.Code 761, to establish an interconnection agreement with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois ("Ameritech"). XO seeks an order compelling Ameritech to interconnect with XO on the same terms and conditions as appear in Ameritech's interconnection agreement with Focal Communications Corporation of Illinois ("Focal Agreement"). Additionally, XO proposes certain additions and revisions to the Focal agreement. On July 9, 2001, XO filed the Verified Statement of Douglas Kinkoph ("Kinkoph Statement")(XO Exh. 1), in support of the Petition.

Ameritech filed its Response to XO's Petition for Arbitration and to the Kinkoph Statement on July 20, 2001 ("Response"). In the Response, Ameritech proposed certain provisions for the XO-Ameritech interconnection agreement that differed from provisions proposed by XO.

On August 2, 2001 XO filed a Motion to Strike portions of Ameritech's Response (as well as portions of the pre-filed direct testimony of Eric L. Panfil, Ameritech Exh. 1), on the grounds that Ameritech: 1) violated Commission policy by inappropriately revealing confidential settlement negotiations and; 2) proffered its proposed interconnection agreement after the close of the arbitration window created by the Federal Act. On August 14, 2001, Ameritech filed its Response to Motion to Strike and Motion to Strike, in which Ameritech recommended that the Commission either deny XO's motion in its entirety or deny it in part and grant Ameritech's counter-motion. The

[1] 47 U.S.C. § 252(b).

Staff of the Commission ("Staff") filed its Response to XO's Motion to Strike on August 15, 2001. Staff opposed XO's motion in part, and suggested principles for resolving the rest.

An Administrative Law Judge ("ALJ") conducted pre-trial hearings on July 9 and 24, 2001, and an evidentiary hearing on August 22, 2001, in Chicago, Illinois. XO presented testimony by Mr. Kinkoph (XO Exh's 1, 2 and 3), Ameritech presented testimony by Mr. Panfil (Ameritech Exh's 1,2 and 3) and Dr. James Zolnierek testified on behalf of Staff (Staff Exh. 1.0 (public) and 1.0-P (proprietary)). XO's Motion to Strike was denied by the ALJ during the course of the evidentiary hearing. At the conclusion of that hearing, the evidentiary record was then marked "heard and taken."

Initial and reply briefs were filed by XO, Ameritech and Staff. Briefs on exceptions ("BOEs") were filed by _____.

II. JURISDICTION

Subsection 252 of the Federal Act provides that within a specified time period "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Both XO's Petition and Ameritech's Response assert that there are "open issues" between the parties. E.g., XO Petition, at 7-8; Ameritech Response, at 17. There is no dispute that the Petition was timely filed. Consequently, the Commission has jurisdiction to arbitrate the issues presented.

Section 252 of the Federal Act proscribes certain procedures, standards and outcomes for arbitrations conducted under that section. In addition, the Commission has adopted rules and procedures for such arbitrations in 83 Ill.Adm.Code 761. The foregoing federal and state provisions apply to this proceeding.

III. OPEN ISSUES PRESENTED AND POSITIONS OF THE PARTIES

XO and Ameritech agree about most of the terms to be included in their prospective interconnection agreement. Ameritech has expressly stated that "XO may adopt the Focal agreement." Petition, App. D, at 1. Ameritech has also agreed to certain additions and revisions to the Focal agreement proposed by XO. *Id*., at 2. Similarly, XO does not oppose the inclusion of certain additional appendices proposed by Ameritech. Response, at 17.

However, these parties disagree with respect to reciprocal compensation for telecommunications traffic exchanged between their respective systems. Reciprocal compensation is the mechanism by which interconnected local exchange carriers pay each other for transporting and completing calls initiated by customers of one carrier and received by customers of another carrier. This formerly included, among other traffic, calls placed by customers of one carrier and received by internet service

providers ("ISPs") served by another carrier. Accordingly, when the Commission issued its Arbitration Order for the Focal Agreement[2], reciprocal compensation under that agreement for ISP-bound traffic was subject to the same rates associated with all other local traffic.

Subsequently, however, the Federal Communications Commission ("FCC"), in Order on Remand and Order (FCC 01-131), in the Matter of Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic, CC Dockets No. 96-98 and 99-98, rel. April 27, 2001, ("ISP Order"), concluded that ISP-bound traffic should be distinguished, for regulatory purposes, from the other traffic that had been subject to reciprocal compensation. More particularly, the FCC held that ISP-bound traffic would no longer be subject to the reciprocal compensation requirement of subsection 251(b)(5) of the Federal Act[3], but would instead by governed by a separate compensation regime crafted by the FCC pursuant to its more general authority under Section 201[4]. ISP Order, para. 52.

The FCC also declared in the ISP Order that "carriers may no longer invoke section 252(i)[5] to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." *Id*., para. 82. As a result, while XO retains the option to generally "opt into[6]" the Focal Agreement, it cannot use subsection 252(i) to require Ameritech to include, in the XO-Ameritech interconnection agreement, any rates in the Focal Agreement that specifically apply to ISP-bound traffic.

Accordingly, XO's position is that the rates for ISP-bound traffic in the XO-Ameritech Agreement must be determined by the regime established by the FCC for such traffic in the ISP Order. That order presents two options for determining the rates for delivering ISP-bound traffic. First, an incumbent local exchange carrier ("ILEC") can elect to pay and receive compensation under interim, capped rates established by the FCC. ISP Order, para's 77 & 78. Ameritech has not yet selected this option. The second option (which the FCC describes as a "mirroring rule") is to apply to ISP-bound traffic the reciprocal compensation rates approved by this Commission for traffic subject

[2] Order, Docket 00-0027, May 8, 2000.
[3] "Each local exchange carrier has the following duties:…(5) The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5).
[4] 47 U.S.C. 201.
[5] Subsection 252(i) states that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. 252(i).
[6] Although the express language of subsection 252(i) imposes a *duty* on local exchange carriers, the FCC has concluded that the statute confers a *right* on the carrier invoking the statute. "[S]ection 252(i) entitles all parties with interconnection agreements to `most favored nations' status…" In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("Local Competition Order"), para. 1316. The federal courts have also regarded subsection 252(i) as an "opt-in" or "most-favored nations" ("MFN") provision. E.g., Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., et al., 221 F.3d 812 (5th Cir. 2000).

to subsection 251(b)(5). *Id*., para. 89. XO asserts that the rates for ISP compensation in an arbitrated XO-Ameritech agreement must be established by the second option, with the result that the reciprocal compensation rates in the Focal Agreement would also apply to ISP-bound traffic exchanged between Ameritech and XO.

In contrast, Ameritech argued during the evidentiary portion of this proceeding that since XO cannot opt into the ISP compensation provisions of the Focal Agreement, it "cannot, by operation of law, opt into provisions of the Focal Agreement that are `legitimately related' to those ISP provisions." Response, at 7. In Ameritech's view, the rates for reciprocal compensation under subsection 251(b)(5) are "legitimately related" to compensation for ISP-bound traffic and are, for that reason, unavailable to XO. Accordingly, Ameritech contended, new rates for subsection 251(b)(5) traffic must be determined first, after which the rates for ISP-bound traffic would be determined in accordance with the ISP Order. Accordingly, Ameritech proposed such rates (discussed in greater detail in Section IV.B. below) to replace the corresponding rates in the Focal Agreement. Those rates appear in the Appendix Reciprocal Compensation ("Appendix RC") attached to the Response.

Subsequently, Ameritech apparently abandoned the foregoing rationale. Ameritech states that it "does not rely in its post-hearing briefs" on the argument "that the unavailability of the Focal provisions governing intercarrier compensation on ISP-bound traffic makes all reciprocal compensation provisions of the Focal Agreement unavailable." Ameritech Reply Brief, at 8, fn. 4. Without that argument, Ameritech's case now rests on two others.

First, Ameritech contends that its proposed reciprocal compensation provisions, contained in Appendix RC, must be considered in this arbitration even though XO has exercised its right under subsection 252(i) to adopt the reciprocal compensation scheme in the Focal Agreement. According to Ameritech, even if XO's subsection 252(i) opt-in rights can be addressed in an arbitration proceeding – and Ameritech maintains that they cannot – that does not preclude Commission consideration of Ameritech's proposed alternatives to the provisions of the Focal Agreement. Ameritech Init. Brief, at 19.

Second, based on the foregoing assumption that the Commission can approve Ameritech's alternative reciprocal compensation mechanism despite XO's election of the Focal Agreement, Ameritech argues that its proposal is superior for two reasons. First, Ameritech avers that its Appendix RC provides a regime that more closely aligns reciprocal compensation rates with their underlying costs. *Id*., at 4-8. Ameritech emphasizes that subsection 252(d)(2)(A) of the Federal Act[7] requires such alignment.

[7] "For the purposes of compliance by a local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless - (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. 252(d)(2)(A).

Id. Next, Ameritech asserts that its reciprocal compensation proposal is complete, while XO's is not. *Id*., at 20-23. Ameritech stresses that an incomplete interconnection agreement would be "unworkable." *Id*., at 23.

Staff agrees with XO that, because Ameritech has not elected to be bound by the FCC's interim rates for ISP-bound traffic, XO can insist that the reciprocal compensation rates in the Focal Agreement be incorporated in the XO-Ameritech agreement. Staff Exh. 1.0, at 16. Staff further concurs with XO that the rates for 251(b)(5) traffic and ISP-bound traffic in the XO-Ameritech agreement would then be "identical," pursuant to the ISP Order's mirroring rule. *Id*., at 13.

Additionally, Staff recommends that the Commission require Ameritech "to immediately determine whether it wants to adopt the reciprocal compensation caps established by the FCC" in the ISP Order. Staff Init. Brief, at 5. Staff alleges that "the failure on Ameritech's part to make a timely decision amounts to anti-competitive behavior" under Sections 251 and 252 of the Federal Act and under Section 13-514 of the Illinois Public Utilities Act ("Act"). *Id*. The underlying rationale for Staff's recommendation is that Ameritech's conduct injects "uncertainty" into the business plans of XO and other competitive local exchange carriers ("CLECs"). XO supports Staff's recommendation, XO Init. Brief, at 15, while Ameritech vigorously objects. E.g., Ameritech Init. Brief, at 23-28.

IV. ANALYSIS AND CONCLUSIONS

A. XO (AND STAFF) v. AMERITECH

The fundamental question posed by the parties' briefs is whether XO's election to opt into the Focal Agreement, pursuant to subsection 252(i), precludes this Commission from requiring that Ameritech's Appendix RC be included in a XO-Ameritech interconnection agreement. In support of its contention that the Commission is not so precluded, Ameritech emphasizes the requirement in arbitration proceedings conducted under the Federal Act that "[t]he State commission shall resolve each issue set forth in the petition and the response…." Ameritech Init. Brief, at 19, quoting 47 U.S.C. 252((b)(4)(C). Having juxtaposed its Appendix RC against the reciprocal compensation provisions of the Focal Agreement selected by XO, Ameritech asserts that we must "resolve" the issue thus created.

Ameritech is correct that we must "resolve" the issues posed by both the petitioner and the respondent in an arbitration conducted under subsection 252(b). However, that does not mean, as Ameritech further insists, that the Commission must – or even can – "resolve" an issue by weighing the relative merits of the parties' proposals outside the context of applicable law. To the contrary, subsection 252(i) retains its force and effect even though XO has requested arbitration. Thus, we must "resolve" this conflict between a CLEC reciprocal compensation scheme demanded pursuant to subsection 252(i) and a parallel ILEC scheme by construing and applying subsection 252(i) and other pertinent statutes. We conclude that the legal support for XO's position

outweighs the corresponding legal support for Ameritech's position.

Ameritech's core argument is that the reciprocal compensation mechanism in its Appendix RC is superior to the corresponding provisions in the Focal Agreement adopted by XO. There is nothing in the Federal Act, FCC decisions or judicial precedent that permits, much less compels, this Commission to hold that when a carrier invokes its MFN rights under subsection 252(i), the other party to a proposed interconnection agreement can defeat those rights with the mere proffer of a "better idea." Were it otherwise, the responding carrier could invariably force the 252(i) carrier into arbitration by simply proposing alternative terms and conditions. That would frustrate the FCC's effort to ensure that a carrier utilizing subsection 252(i) is "permitted to obtain its statutory rights on an expedited basis…[to] ensure competition occurs as quickly and efficiently as possible." FCC Local Competition Order, para. 1321. In effect, subsection 252(i) would be nullified.

This is not to say that this Commission agrees with XO's claim that the rights conferred by subsection 252(i) are "absolute." XO Init. Brief, at 3. The FCC has concluded otherwise, stating that there are, for example, technical feasibility issues (pursuant to Section 251(c)(2)) and differences in the relative costs of serving different CLECs that could override the rights created by subsection 252(i). *Id*., para. 1317. Similarly, Ameritech raises a claim here that could, at least arguably, undermine XO's reliance on subsection 251(i) – that is, that the alleged deficiency of XO's proposed reciprocal compensation rates under subsection 252(d)(2)(4) takes precedence over XO's MFN rights.

We need not reach that issue, however, unless Ameritech has first established that the reciprocal compensation rates proposed by XO are actually deficient under subsection 252(d)(2)(A). We conclude that Ameritech has not done so. Subsection 252(d)(2)(A) simply requires that reciprocal compensation rates be based on "a reasonable approximation of the additional cost of terminating such calls." We have already determined that the rates in the Focal Agreement meet that test, having approved the Focal Agreement in Docket 00-0027. In order to facilitate competition among service providers, subsection 252(i) permits another carrier to rely on that determination without having to re-prove the basis for it.

Ameritech argues, however, that the rates it proposes in its Appendix RC more accurately reflect underlying costs than the rates in the Focal Agreement. Even if this were true, subsection 252(d)(2)(A) does not require reciprocal compensation rates based on the best possible determination of cost. It requires only rates that reflect a "reasonable approximation" of the cost of call termination. Thus, the principle on which Ameritech relies ("[t]he more precisely reciprocal compensation rates reflect costs, the better"[8]), while certainly reasonable, does not accurately express what is required by subsection 252(d)(2)(A).

Nor should it, if the provisions of the Federal Act are going to function harmoniously to effectuate the Congress's pro-competitive mandate. It would always be

[8] Ameritech Init. Brief, at 3.

possible to revisit cost studies, to refine them or incorporate additional inputs. However, that would blunt the effectiveness of subsection 252(i), thereby delaying interconnection among carriers and inhibiting the expeditious development of competition. In our view, Congress wisely prevented that unwelcome result by requiring, in subsection 252(d)(2)(A), only a reasonable relationship – not the closest possible relationship - between rates and costs.

Moreover, while Ameritech has raised legitimate concerns regarding intercarrier compensation *for ISP-bound calls*, it has not demonstrated, *with respect to 251(b)(5) traffic*, that the rates in its Appendix RC are better aligned with underlying costs than the reciprocal compensation rates in the Focal Agreement. The fundamental premise on which Ameritech builds its critique of existing reciprocal compensation rates is that "[t]he nature of the traffic on the networks of local service providers has change dramatically, *driven primarily by the explosion in Internet access traffic*." Ameritech Init. Brief, at 6 (emphasis added). More particularly, Ameritech asserts that the longer "hold times" associated with ISP-bound traffic have not been factored into the rates applicable to typically shorter 251(b)(5) calls (resulting in beneficial arbitrage opportunities for some CLECs). *Id*. Assuming that Ameritech's critique is sound, it shows a mismatch between ISP-bound traffic and applicable rates, not between 251(b) traffic and reciprocal compensation rates. Thus, by proposing new reciprocal compensation rates *for 251(b)(5) traffic*, in order to better reflect the cost of *ISP-bound traffic*, Ameritech is potentially introducing, not alleviating, misalignment between the cost of delivering 251(b)(5) traffic and reciprocal compensation rates.

Accordingly, the Commission sees no deficiency under subsection 252(d)(2)(A) - either absolutely or relative to Appendix RC - in the cost basis for the reciprocal compensation rates in the Focal Agreement. It follows that Ameritech has not established grounds for pitting XO's subsection 252(i) rights against the mandate of subsection 252(d)(2)(A) that reciprocal compensation rates bear a reasonable relationship to cost. Therefore, the reciprocal compensation provisions of the Focal Agreement, requested by XO pursuant to subsection 252(i), must be included in the XO-Ameritech interconnection agreement.

Ameritech also contends, however, that XO's subsection 252(i) rights "cannot properly be determined in a subsection 252(b) arbitration *at all*." Ameritech Init. Brief, at 19 (emphasis added). In support of its position, Ameritech emphasizes that a subsection 252(b) arbitration is limited to "open issues" concerning "the particular terms and conditions of agreements to fulfill the duties" enumerated in subsection 251 of the Federal Act. *Id*. Ameritech avers that its responsibilities under subsection 252(i) are separate from the "duties" listed in subsection 251. It follows, according to Ameritech, that XO's MFN rights under subsection 252(i) cannot be an "open issue" in this arbitration.

Ameritech misconstrues the provisions of the Federal Act. Subsection 252(b)(4)(C) requires the state commission to "resolve each issue...by imposing appropriate conditions as required to implement subsection (c) [of Section 252]." Subsection (c)(1) directs the

state commission to "ensure that each such resolution and conditions meet the requirements of section 251." Subsection 251(b)(5) requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Placing Ameritech's argument in the foregoing statutory framework, it asserts that in resolving the issue of how XO and Ameritech will establish reciprocal compensation rates to satisfy subsection 251(b)(5), the Commission must ignore the existence of subsection 252(i) of the Act.

This is patently incorrect. The Commission cannot ignore an applicable statute. When establishing the conditions under which the arbitrating parties must meet the requirements of Section 251, we must take the entire Federal Act into consideration. In some arbitrations, we will not have to consider the impact of subsection 252(i) - because the CLEC has not invoked its MFN rights. But when the CLEC *has* invoked those rights, the Commission must determine the resulting impact. In this instance, because Ameritech has not established a basis for disregarding XO's MFN rights, the result is that the parties must satisfy subsection 251(b)(5) by adopting the reciprocal compensation arrangements set forth in the Focal Agreement.

Even if Ameritech had demonstrated a basis for overriding XO's MFN rights, that would not have been because the requirements of Section 252 are beyond the scope of an arbitration proceeding. To the contrary, it would have been because another subsection of that very statute - 252(d)(2)(A) - trumped subsection (i). Indeed, one of the Commission's mandatory tasks in an arbitration is to assure that the charges for transport and termination of traffic meet the costing requirements of subsection 252(d)(2)(A).

In sum, one means of satisfying subsection 251(b)(5) is by invoking 252(i). If the ILEC opposes that invocation - whether because of an alleged failure to satisfy another subsection of Section 252, or because it asserts it has a superior proposal - the resulting issue is arbitrable.

Moreover, Ameritech's contention produces an unreasonable result. If a CLEC invokes its 252(i) MFN rights, but cannot offer that invocation as its mechanism for satisfying subsection 251(b)(5) in an arbitration, it is left without a recommendation for the Commission. In effect, there is nothing left to arbitrate, and the CLEC is penalized for invoking a clear statutory right. This unsupportable outcome flows from Ameritech's conceptually flawed view that subsection 252(i) is a separate avenue to an interconnection agreement, one that can never lead to arbitration. To the contrary "it is a tool to facilitate the creation of negotiated *and arbitrated* agreements." Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., et al., 221 F.3d 812 (5th. Cir. 2000) (emphasis added).

Indeed, in Southwestern Bell, it was taken as a given that subsection 251(i) rights can be considered in an arbitration by a state commission. The court simply reviewed the commission's determination concerning the scope of those rights. Similarly, in Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F.Supp.2d 492 (D.Ct. Del. 1999), the state commission arbitrated, and the court reviewed, a dispute regarding the terms of a

pre-existing interconnection agreement opted into by a CLEC under subsection 252(i). For its part, Ameritech cites no judicial authority showing that 252(i) rights are beyond the boundary of an arbitration proceeding.

B. STAFF (AND XO) v. AMERITECH

Staff recommends that we order Ameritech to "immediately" choose or decline the FCC's rate caps for ISP-bound traffic, as set out in the ISP Order, and "to commit to its choice until such time as the Commission determines that changes in federal or state regulations warrant departure from this commitment." Staff Init. Brief, at 4. Staff characterizes this recommendation as a remedy for the uncertainty that Ameritech has imposed on CLEC business plans by not taking a definitive position regarding the FCC's rate options. *Id*. at 5. In Staff's judgment, Ameritech's silence constitutes anti-competitive behavior, in contravention of Section 13-514 of the Act[9]. *Id*.

Ameritech opposes Staff's recommendation on several grounds. First, Ameritech argues that subsection 252(b)(4)(A) precludes the Commission from arbitrating an issue that was not asserted in either the Petition or the Response. Ameritech Init. Brief, at 24. Since Staff is neither the petitioner nor the respondent, its issue is not arbitrable, in Ameritech's view. Ameritech acknowledges that the resolution of a properly arbitrable issue might also require resolution of a related issue not expressly raised by the carriers, but maintains that Staff's proposal does not raise such an issue. "The Commission can readily decide all the issues that XO and Ameritech have set forth for arbitration without delving into the question raised by Staff." *Id*.

Second, Ameritech maintains that Staff's recommendation could not be arbitrated under Section 252 even if it had been raised in the Petition or Response, because it does not pertain to the duties established in Section 251. *Id*. "If the Commission were to entertain Staff's proposal, it would not assess the proposal by looking to anything in [Section 251]. Indeed *the rate caps themselves are not even a creature of Section 251*. Rather, the FCC promulgated them pursuant to its authority under section 201." *Id*., at 25 (emphasis in original).

Third, Ameritech charges that Staff's proposal would potentially initiate a series of events that would render it impossible to complete this arbitration within the time period contemplated by the Federal Act. *Id*., at 26.

Fourth, Ameritech avers that Staff's recommendation is inconsistent with the ISP Order. "[T]he FCC deliberately and explicitly left the decision as to when (or whether) to declare its intention to implement the rates caps up to each ILEC on a state-by-state

[9] "Prohibited Actions of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition …. (8) violating the terms or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonable delays, increases the cost, or impedes the availability of telecommunication services to consumers." 220 ILCS 5/13-514.

basis." *Id*., at 27.

Fifth, Ameritech argues that its conduct "cannot possibly" violate subsection 8 of Section 13-514 because "subsection 8 addresses violations of *existing* interconnection agreements and delays in implementing *existing* interconnection agreements, not alleged misconduct in the making of interconnection agreements." Ameritech Reply Brief, at 14 (emphasis in original).

Staff counters that the range of action available to the Commission under subsection 252(b) "should not be limited to the specific language of the issues enumerated on the face of the parties' petitions, with no regard to issues that are both directly related to and inseparable from those issues." Staff Reply Brief, at 8. In Staff's view, Ameritech's plans with regard to the FCC rates caps are "pertinent to the primary issue at hand." *Id*. In response to Ameritech's argument that Staff's forced declaration would delay resolution of open issues beyond the statutory time limit, Staff avers that this proceeding could be completed on schedule if Ameritech promptly states that it is declining the FCC's rate caps. *Id*., at 9.

The Commission generally agrees with Staff that subsections 252(b) and (c) empower us to craft the conditions by which the parties to an arbitrated interconnection agreement shall fulfill their duties under section 251. In our judgment, this certainly includes conditions pertaining to the reciprocal compensation requirement in subsection 251(b)(5).

However, the Commission agrees with Ameritech that we cannot impose the particular condition Staff proposes. The FCC could have, but did not, establish a deadline by which ILECs must declare their intentions with respect to rate caps. Nor did the FCC signal that the imposition of a deadline was left to the state commissions. The FCC was clearly aware of timing issues, since it described its compensation scheme for ISP-bound traffic as an *interim* measure, intended to curtail "market distortions" while it "consider[s] the desirability of adopting a uniform carrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers." ISP Order, para. 66. Implicitly, the FCC has thus rejected a deadline for electing its rate caps. This Commission has no authority to revise or supplement - much less, overrule - the implicit decision of a superior sovereign.

We do not mean to suggest that Staff's concerns regarding competition are unwarranted. A declaration by Ameritech would remove a degree of uncertainty from the CLECs' planning horizons. Nonetheless, that removal must come from the FCC.

C. CONTENTS OF THE XO-AMERITECH AGREEMENT

Having concluded that the reciprocal compensation rates of the Focal Agreement should govern the exchange of subsection 251(b)(5) traffic between XO and Ameritech, and that, pursuant to the ISP Order, those rates should also apply to the exchange of ISP-bound traffic, we must now determine the specific provisions to be included in the XO-Ameritech agreement.

XO initially proposed minor modifications to the Focal Agreement's reciprocal compensation provisions (sections 4.7 through 4.7.3) "to remove reference to the fact that the rate for ISP traffic was based on the Commission decision in the Focal Arbitration." XO Reply Brief, at 21. Mr. Kinkoph asserts that XO's modifications simply reflect his company's belief that the ISP Order's mirroring rule would determine compensation for ISP-bound traffic. Tr. 71.

For its part, Ameritech requested that the reciprocal compensation provisions of the Focal Agreement be deleted entirely and replaced with Ameritech's Appendix RC. Ameritech also requested the addition of other appendices, about which there is apparently no dispute. Response, at 17. The totality of Ameritech's proposed interconnection agreement would consist of the Focal Agreement without sections 4.7 through 4.7.3, and Ameritech's appendices, including Appendix RC. *Id*.

Subsequently, XO proposed to adopt portions of Appendix RC, with revisions by XO. XO Reply Brief, at 21. XO asserts that it did this in order to satisfy Ameritech's insistence "that the agreement have more specificity in its treatment of ISP traffic." *Id*. XO notes that Mr. Kinkoph had generally voiced XO's acceptance of the pertinent elements of Appendix RC during the evidentiary hearings in this docket. *Id*., citing, e.g., Tr. 75-78.

The Commission concludes that XO's recommended revision to Ameritech's Appendix RC should be included in the XO-Ameritech interconnection agreement. Although Mr. Kinkoph is correct that ISP-bound traffic would be categorized and paid for in a manner consistent with the FCC's mirroring rule, Tr. 76, the XO-Ameritech interconnection agreement would nonetheless benefit, as Ameritech suggests, from explicit and detailed text. XO's proposed language also preserves Ameritech's intention to reserve the rights of the parties under the ISP Order, the FCC's ongoing intercarrier compensation rulemaking[10], and other administrative and judicial orders.

The Commission rejects each of Ameritech's objections to the adoption of the portions of Appendix RC revised by XO. First, Ameritech claims that when a carrier asserts its MFN rights under subsection 252(i), it "cannot add new, related, provisions to the package." Ameritech Reply Brief, at 7. That argument was directly refuted in Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., et al., 221 F.3d 812 (5th. Cir. 2000), where the court found "nothing in the language of the MFN provision that prohibits a CLEC from accepting some provisions of an existing agreement and then negotiating and arbitrating the terms of other provisions it wishes to include in its own agreement…." *Id*., at 818. That finding is consistent with the United States Supreme Court's approval of the "pick and choose" rule, which allows a carrier to invoke subsection 252(i) to select provisions from several existing interconnection agreements in order to create a new agreement. AT&T Corporation v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed. 2d 834 (1999). If a CLEC can pick and choose among existing

[10] Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, rel. April 27, 2001 ("NPRM").

agreements, thereby limiting the range of options available to the ILEC, we perceive no reason why it cannot also propose additional provisions, to which the ILEC can offer counter-proposals, and about which the ILEC can initiate arbitration.

Second, while supporting the Commission's practice of allowing "modest" changes to a carrier's position during arbitration, Ameritech avers that XO's revision to Appendix RC "is much more extensive and comes unusually late in the process." Ameritech Reply Brief, at 4, fn. 3. However, since the relevant provisions are, for the most part, taken verbatim (or with trivial modification) from Ameritech's own proposal, there is no surprise to Ameritech.

We recognize that Ameritech might well respond that it proposed Appendix RC as a unified provision, and that deletions and revisions detract from Ameritech's intended purpose. However, when a party submits its proposals in a subsection 252 arbitration, there is no guarantee that they remain unaltered by the Commission. This is not a "baseball style" arbitration in which the arbitrator must adopt one party's proposal in its entirety. State commissions are expressly authorized by subsection 252(b)(4)(C) to craft conditions that effectuate the intentions of the Federal Act. We adopt XO's proposed revisions to Ameritech's proposal pursuant to that authority.

Furthermore, the Commission notes Ameritech's contention that XO's proposed interconnection agreement is incomplete because it does not explicitly address ISP-bound traffic. Indeed, Ameritech stresses that "[i]n the context of this proceeding, the most important single thing for the XO/Ameritech Illinois interconnection agreement to address is ISP-bound traffic. If nothing else, the agreement must clearly say whether the parties are going to compensate each other for the transport and termination of such traffic and, if they are, at what rates." Ameritech Init. Brief, at 21. By approving XO's adoption of a modified version of Ameritech's own proposal, we provide the specificity Ameritech advocates.

In sum, along with the terms and conditions of the Focal Agreement adopted by XO, the XO-Ameritech interconnection agreement should include the contents of Appendix E to the Petition, the portions of Ameritech's Appendix RC revised by XO, and the other appendices identified on page 17 of the Response. XO and Ameritech should accomplish whatever formatting and numbering is necessary to put the resulting agreement in the proper form for submission to this Commission pursuant to subsection 252(e). **Such submission should occur no later than 15 days after the day on which this Arbitration Order is issued by the Commission.** We will view with great disfavor any delay that results in failure to meet this deadline.

D. AMERITECH'S BIFURCATED RATE PROPOSAL

Although the Commission finds no basis for overriding XO's invocation of its subsection 252(i) MFN rights and replacing the reciprocal compensation provisions of the Focal Agreement with Ameritech's rate proposal, Ameritech's recommendation nevertheless warrants additional discussion. Ameritech maintains that with "virtually all service providers in Illinois charging reciprocal compensation rates that mirror Ameritech Illinois' rates, the current rate structure causes many service providers to be over-

compensated, and others to be under-compensated...." Ameritech Init. Brief, at 6 (footnotes omitted). More specifically, Ameritech charges that some CLECs derive undeserved revenue from Ameritech through the application of reciprocal compensation rates to ISP-bound traffic. Ameritech states that this is because current reciprocal compensation rates are based on average call durations that fail to reflect the protracted length of calls placed to ISPs. *Id*.

Ameritech's proposed remedy is to bifurcate reciprocal compensation rates, so that call set-up and call duration are recovered through separate rate elements. *Id*., at 7. The call set-up rate would apply only to the initial minute of a call, while the call duration rate would track each minute of usage. *Id*., at 7-8. This would eliminate the repetitive application of the call set-up charge over the duration of a call, thereby reducing the reciprocal compensation typically paid by Ameritech to the CLECs that serve ISPs.

Ameritech's concerns are not unreasonable. Indeed, the FCC has concluded that carriers "have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments." ISP Order, para. 68 (footnote omitted). However, in the ISP Order, the FCC has simultaneously removed ISP-related compensation from the purview of the state commissions and fashioned an interim remedy of its own. Unlike Ameritech's proposed remedy here, the FCC's remedy does not establish new rates for subsection 251(b)(5) non-ISP traffic. Instead, the FCC has established separate, capped rates for ISP-bound traffic.

Since the ISP Order precludes us from adopting intercarrier compensation rates (including Ameritech's proposed bifurcated rates) for ISP-bound traffic, and since XO has invoked its MFN rights regarding subsection 251(b)(5) traffic, Ameritech must look to the FCC's remedy for a degree of relief for the problem it perceives. Alternatively, Ameritech can await the outcome of the FCC's NPRM, in which that commission is considering whether it "should replace existing intercarrier compensation schemes with some form of what has come to be known as `bill and keep'." ISP Order, para. 2 (footnote omitted).

E. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues and impose conditions upon the parties in a manner that comports with three standards. The Commission holds that the analysis in this Order satisfies that requirement.

First, subsection 252(c)(1) directs us to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." Here, the specific provision of Section 251 that has been placed at issue by the parties is subsection (b)(5). We have determined that XO's invocation of its MFN rights under subsection 252(i) yields a reciprocal compensation regime for XO and Ameritech that meets the requirements of subsection 251(b)(5).

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Reciprocal compensation is neither a "service" nor a "network" element within the meaning of subsection 252(c)(2), and Ameritech maintains that it is also distinct from, and not a term or condition of, "interconnection." Ameritech Init. Brief, at A-4. Even if Ameritech were correct, however, that would not mean that the Commission had failed to meet the standard contained in subsection 252(c)(2). Rather, it would mean that the rates associated with interconnection were already established separately – that is, apart from reciprocal compensation - by the Focal Agreement and were not "open issues" to which the subsection 252(c)(2) standards apply.

Ameritech is not correct, though. Ameritech relies on the fact that "reciprocal compensation" is the subject of subsection 251(b)(5), while "interconnection" is addressed by a different provision, subsection 251(c)(2). *Id*., at A-5. However, we have previously held that reciprocal compensation provisions are included among the "terms and conditions" of interconnection addressed by subsection 251(c)(2)(D). QST Communications, Inc., v. Ameritech Illinois, Docket 98-0603, Order, Nov. 5, 1998, at 15. We conclude now that the "rates for interconnection" addressed in subsection 252(c)(2) and the "rates" described in subsection 251(c)(2)(D) both encompass, among other rate elements, the rates associated with reciprocal compensation. The issue of reciprocal compensation rates for transporting and terminating another carrier's traffic only arises because of, and in conjunction with, interconnection. Therefore, the "rates" associated with the former are a subset of the "rates" for the latter.

Third, pursuant to 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." The Focal Agreement, adopted by XO here, contains the requisite implementation terms (e.g., Section II.1 ("Interconnection Activation Date"), Article XVIII ("Implementation Team and Implementation Plan"), and Section XIX.1 ("Compliance with Implementation Schedule").

F. XO MOTIONS AND EXTRA-RECORD MATTER

On September 4, 2001, during the briefing phase of this proceeding, XO filed a Motion to Take Administrative Notice ("Motion 1"), which pertains to certain Comments of SBC Communications, Inc., filed with the FCC in the NPRM on August 21, 2000. XO argues that these comments by Ameritech's corporate parent, advocating a bill-and-keep regime for intercarrier compensation, demonstrate that "Ameritech is not supporting the bifurcated rate plan as a permanent means of providing carriers with reciprocal compensation." Motion 1, at 2.

On September 11, 2001, XO filed a Motion to Take Administrative Notice of Ameritech Opposition ("Motion 2"), which regards a document filed by Ameritech in Docket 01-0572. According to XO, that document, entitled Ameritech's Verified Opposition to Request for Emergency Relief, "sheds additional light on the arguments made by Ameritech in this proceeding." Motion 2, at 2. More specifically, XO asserts

that the document "demonstrates that there is no procedure [for invoking subsection 252(i) rights] that will satisfy Ameritech." XO Reply Brief, at 10.

The Commission denies both motions. Motion 1 addresses the intended longevity of Ameritech's bifurcated rate proposal here, but does not meaningfully touch upon the efficacy of, or legal support for, that proposal. Regarding Motion 2, the Ameritech filing, at most, "sheds additional light" on the tenacity of Ameritech's general opposition to the CLECs' use of subsection 252(i) to opt into pre-existing reciprocal compensation schemes. It adds little or nothing, however, to the bases on which we resolve the open issues in this case. In such circumstances, we will not add post-record evidence to an already adequate record.

Ameritech also endeavors to support its arguments with extra-record matter but, unlike XO, does not take the trouble to request administrative notice. Specifically, Ameritech quotes from a document denominated a Response to Verified Complaint and Request for Emergency Relief, filed by Staff in Docket 01-0572. Ameritech Reply Brief, at 14-15. Ameritech offers this extra-record matter to impeach the position Staff adopts in this proceeding with regard to the meaning of Section 13-514 of the Act. This extra-record matter was not presented in accordance with our Rules of Practice[11] and we hereby strike it, *sua sponte*, from Ameritech's Reply Brief.

Dated: September 18, 2001
Briefs on Exceptions: September 26, 2001

PLEASE TAKE NOTE: Briefs on exceptions MUST be served upon opposing counsel and the Administrative Law Judge, and filed with the Clerk of the Commission, before the close of business on the due date. No exception to this requirement will be granted for any reason.

[11] 83 Ill.Adm.Code 200.